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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 72.

J. D. SHELLEY and ETHEL LEE SHELLEY, His Wife,
Petitioners,

vs.

LOUIS KRAEMER and FERN KRAEMER, His Wife,
Respondents.

Brief of Arlington Heights Property Owners Association, et al., as Amicus Curiae.

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Brief of Arlington Heights Property Owners Association, et al., as Amicus Curiae.

Summary of the Argument.

This *amicus curiae* brief is filed on behalf of several thousand property owners in Los Angeles, California; it relates only to restrictions against occupancy, and not to restrictions against sale.

I.

Neither Covenants Restricting the Use of Real Property to Persons of a Specified Race nor the Enforcement Thereof by the Courts Conflicts With Any Provision of the Constitution or Statutes of the United States.

A. The Constitution and Federal Statutes Relate Only to Action by the Federal and State Governments and Not to Contracts of Private Individuals.

The covenants in question are imposed by private individuals for their own private purposes.

They do not violate the due process clause; they neither take any property from petitioners nor affect their rights to a full and fair hearing in court with respect to their rights. Petitioners are not deprived of property because they did not buy and never owned the right to occupy the premises.

Such covenants do not deny equal protection of the laws, since they are merely private agreements between private individuals regarding the use of privately owned property, and the individuals who make them do not make the law nor act in the name of nor as agents of the State.

The prohibitions against denial of due process or equal protection apply only to action by the Federal or State Governments and not to contracts of private individuals.

So far as we can ascertain every court of last resort which has examined the question supports these views.

B. Enforcement of Such Restrictions by the Courts Does Not Constitute Action by the State, in Violation of Equal Protection, or Due Process Clauses of the Constitution.

Members of every race have the same right to restrict use of property as Caucasians have; hence, there is no denial of equal protection in permitting Caucasians to exercise such right.

Since the contracts in question are merely private contracts, the right to make which is not conferred upon them by the courts but is a common law and Constituional right, and since the function of the courts is merely to interpret and declare the rights of the parties and provide a peaceful method for their enforcement, no action by the state is involved in such proceedings. The owner of a tract of land may make an agreement with certain individuals, or the members of specified organizations, per-

mitting them to use the land without depriving other persons of due process or equal protection of the law. Private clubs, fraternal and religious organizations may extend privileges to their members and deny them to others without constitutional objection. There is no essential difference between such agreements and agreements between land owners relative to the use to which their land may be put.

To construe the decree of a state court enforcing private contracts as involving action by State Government in violation of the Fourteenth Amendment would give the Constitution a strained and unnatural construction and result in a chaotic condition of the law.

Such construction has been rejected by every court which has considered it, so far as we can ascertain.

C. The Statutes Cannot Afford Petitioners More Protection Than the Constitution.

II.

Such Agreements Do Not Violate Public Policy.

There is no act of Congress or other evidence of national policy on the subject of race restrictions. The public policy of each state on the subject of racial relations may differ, but every state court which has considered the subject has held there is no public policy of its state against such restrictions.

The Tenth Amendment to the United States Constitution reserves to the states the right to establish their own public policy on such contracts.

The right to discriminate in business and social relationships is a natural and constitutional right exercised by all races and religions.

III.

Such Restriction Agreements Are Not Affected by Any Treaty of the United States.

The Charter of the United Nations was intended to apply to international relations and not to private, internal business and social affairs of the citizens of the member nations.

The United States does not have the right, by treaty or otherwise, to invalidate private agreements such as these.

Statement of the Case.

This brief is filed on behalf of the Arlington Heights Property Owners Association, Adams to Washington Association, Southwest Wilshire District Protective Association, Charles Victor Hall Tract Association, Community Protective Association (Slauson-Manchester area) and the Slauson-Figueroa-Manchester-Central Property Owners Protective Association, which are organizations comprising several thousand Caucasian property owners in the City of Los Angeles, California, of every shade of social, religious and political beliefs, but who are united in their desire to maintain their homes and raise their families in communities inhabited by persons of their own race. It is our purpose to show that such a desire is neither reprehensible nor illegal, but, on the contrary, that it is consistent with a fundamental law of nature and with the Constitution and laws of the United States.

Although the agreement involved in the instant case imposes restrictions upon both the sale of real property to, and the occupancy of such property by, persons of other than the Caucasian race, we shall discuss only the restriction relating to occupancy, since it seems obvious that

the question of restraint on alienation must be decided in accordance with state law, and since the California courts long ago decided that a restriction against sale was a restraint on alienation, in violation of a section of the California Civil Code. The decision to that effect made it clear, however, that there was no constitutional ground of invalidity against either type of restriction. The case referred to is *Title Guarantee and Trust Co. v. Garrott*, 42 Cal. App. 152 (approved by the California Supreme Court in *Los Angeles Investment Company v. Gary*, 181 Cal. 680), in which it was said:

> "The condition, however, that the property should not be occupied by a person not of Caucasian birth is in a different category. It is not a restraint upon the alienation, but upon the use of the property. There is no prohibition by statute of such restraints imposed by way of condition nor was there any at common law."

See, also:

Wayt v. Patee, 205 Cal. 46, 48;

Meade v. Dennistone, 173 Md. 295; 196 Atl. 330; 114 A. L. R. 1227.

Since "the question involved is purely a legal one" (*Parmalee v. Morris*, 218 Mich. 625; 188 N. W. 330; 38 A. L. R. 1180), and must be decided as such, we shall not discuss sociological theories, but shall limit our argument to the legal aspects of the case. It does seem proper to suggest, however, that there is no reason to believe that the national crisis in housing, which affects all races, will be solved, or that racial tolerance will be enhanced, by a decision which would permit non-Caucasians to invade a neighborhood which the other residents desire to maintain as a Caucasian community.

ARGUMENT.

I.

Neither an Agreement Restricting the Use of Property to Persons of a Specified Race nor the Enforcement of Such an Agreement by a State Court Conflicts With Any Provision of the United States Constitution or Statutes.

A. Deeds and Contracts Imposing Restrictions Upon the Use or Occupancy of Property, Executed by Private Individuals for Their Own Private Purposes, Are Perfectly Valid and Not in Contravention of Either the Fifth or Fourteenth Amendments nor of Any Other Provision of the Constitution.

1. THE DEEDS OR CONTRACTS DO NOT VIOLATE THE "DUE PROCESS" CLAUSE.

The very fact that it is a decree of a court of competent jurisdiction, entered after a trial on the merits, which it is claimed violates the due process clause effectually negatives that claim. This Court stated the requirements of due process of law in *Anderson National Bank v. Luckett*, 321 U. S. 233; 64 S. Ct. 599, 606; 88 L. Ed. 692; 151 A. L. R. 824, as follows:

> "The fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked. If that is preserved, the demands of due process are fulfilled."

In the famous case of *Corrigan v. Buckley*, 271 U. S. 323, which also involved the enforcement of a race restriction agreement, this Court disposed of the contention

that such enforcement denied due process of law, saying (p. 331-332):

> "The defendants were given a full hearing in both courts; they were not denied any constitutional or statutory right; and there is no semblance of ground for any contention that the decrees were so plainly arbitrary and contrary to law as to be acts of mere spoliation . . . Mere error of a court, if any there be, in a judgment entered into after a full hearing does not constitute a denial of due process of law."

If it be contended that in the *Corrigan* case the Fourteenth Amendment was not involved, certainly the Fifth Amendment was involved, and this Court has held that "due process" means the same in both amendments. (*Levy v. Lewis*, 295 U. S. 768; 55 S. Ct. 652; 79 L. Ed. 1709.) The only difference is that the Fifth Amendment "is a limitation only upon the powers of the general government," while the Fourteenth Amendment refers "to state action exclusively." (*Corrigan v. Buckley*, 271 U. S. 328, 330.)

It cannot be contended that petitioners are deprived of any property by the restriction against their occupancy of the property in question. They knew when they bought the property that it was restricted against their occupancy. When they took title, they succeeded to the rights and obligations of their predecessors; they became parties to the contract. They did not buy the right to occupy the property. They got exactly what they paid for. If they had purchased property subject to the restriction that it be used for residential purposes only, could they maintain that they were deprived of property because they were enjoined from using it for business purposes? No one is trying to deprive petitioners of any right or

property which they own; on the contrary, petitioners are trying to deprive respondents of rights which respondents own. Respondents have a contract right as to the occupancy of property in their community. This is a valuable property right, which not only adds to their peace and happiness in their homes but protects and stabilizes the monetary value of their property. Petitioners seek, by depriving respondents of their rights, to add to the rights which petitioners purchased a right of occupancy which they did not purchase. If they are prevented from doing this, no property is taken from them.

The subject of "due process" is further discussed in the cases cited with respect to "equal protection."

2. The Deeds or Agreements Do Not Deny Equal Protection of the Law.

In this brief we refer only to restrictions imposed by deed or agreement of private persons, and not to those attempted to be imposed by ordinance or other public law. The latter, as an exercise of public authority, probably would violate the equal protection clause of the Fourteenth Amendment. The former, as private agreements between private individuals regarding the use of privately owned property, could not possibly deprive anyone of the equal protection of the law, for the individuals who make such agreements neither make nor control the law, nor act in the name of, nor as agents of, the state.

This distinction was very clearly stated by this Court in *Corrigan v. Buckley* (*supra*), 271 U. S. 323, 329, 330, as follows:

> "Under the pleadings in the present case the only constitutional question involved was that arising under the assertions in the motions to dismiss that the indenture or covenant which is the basis of the bill,

is 'void' in that it is contrary to and forbidden by the Fifth, Thirteenth and Fourteenth Amendments. This contention is entirely lacking in substance or color of merit. The Fifth Amendment 'is a limitation only upon the powers of the General Government,' Talton v. Mayes, 163 U. S. 376, 382, and is not directed against the action of individuals. The Thirteenth Amendment denouncing slavery and involuntary servitude, that is, a condition of enforced compulsory service of one to another; does not in other matters protect the individual rights of persons of the negro race. Hodges v. United States, 203 U. S. 1, 16, 18. And the prohibitions of the Fourteenth Amendment 'have reference to state action exclusively, and not to any action of private individuals.' Virginia v. Rives, 100 U. S. 313, 318; United States v. Harris, 106 U. S. 629, 639. 'It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the Amendment.' Civil Rights Cases, 109 U. S. 3, 11. It is obvious that none of these Amendments prohibited private individuals from entering into contracts respecting the control and disposition of their own property; and there is no color whatever for the contention that they rendered the indenture void."

The meaning and purpose of the equal protection clause is clearly set forth in *Title Guarantee and Trust Co. v. Garrott, supra,* 42 Cal. App. 152, 154:

"The equal protection clause of the Fourteenth Amendment makes but one demand upon the state, and gives to the state but one right. It is that the state shall make, execute, and interpret its laws without discrimination. It must not grant rights to one which, under similar circumstances, it denies to another."

While that was a decision of a District Court of Appeal, it was affirmed by the California Supreme Court in an order denying a hearing, and expressly approved in a later opinion by the latter court in *Los Angeles Investment Company v. Gary*, 181 Cal. 680, 682 (*supra*).

In a case which did not deal with race restrictions relating to the use of real property, the United States Court of Appeals for the District of Columbia demolished the theory that acts of private individuals are affected by either the Fifth or Fourteenth Amendment. The Court there had under consideration rules of a labor organization which placed limitations upon the rights of its colored members. The case referred to is *National Federation of Railway Workers v. National Mediation Board* (1940), 110 F. (2d) 529 (certiorari denied, 60 S. Ct. 975). The Court discussed the applicability of the Fourteenth Amendment to such rules, and said (p. 537):

> "The guarantees of the 14th amendment, U. S. C. A. Const., relate solely to action by a state government, clearly absent here. Hence, any constitutional rights pertinent to the instant case are those guaranteed by the 5th amendment. Decisive of this constitutional issue is the established proposition that the 5th amendment relates only to governmental action, federal in character, not to action by private persons. Corrigan v. Buckley, 271 U. S. 323, 330, 46 S. Ct. 521, 70 L. Ed. 969. Thus the Brotherhood, a private association, acting on its own initiative and expressing its own will, may limit the rights of its colored members, without thereby offending the guarantees of the Constitution."

We respectfully suggest that an agreement among property owners concerning the use to which their property will be put is much further removed from the effect of the

Fifth and Fourteenth Amendments than are the rules of a labor organization acting under powers conferred by law.

It must be borne in mind that the right to restrict the use of property through the use of such deeds or agreements is not limited to members of the Caucasian race. Members of any other race are equally entitled to protect their property in like manner.

So far as we can ascertain every court of last resort which has passed on this subject has sustained the validity of such agreements. One of the leading cases is *Parmalee v. Morris* (*supra*), 218 Mich. 625; 188 N. W. 330; 114 A. L. R. 1180.

Among the later cases are the following:

Lion's Head Lake Co. v. Brzezinski (Dist. Ct. N. J.), 43 A. (2d) 729;

Meade v. Dennistone (*supra*) (1938), 173 Md. 295, 196 Atl. 330; 114 A. L. R. 1227;

Lyons v. Wallens (1942), 191 Okla. 567;

Helmsley v. Hough (1945), 157 P. (2d) 182; 195 Okla. 298;

Helmsley v. Sage (1944), 154 P. (2d) 577, 194 Okla. 669;

Dooley v. Savannah Bank & Trust Co. (1945), 34 S. E. (2d) 522; 199 Ga. 353;

Steward v. Croman (1940), 98 P. (2d) 999; 105 Colo. 393;

Chandler v. Ziegler (1930), 291 Pac. 822; 88 Colo. 1;

Fairchild v. Raines (1944), 24 Cal. (2d) 818; 151 P. (2d) 260;

United Co-op Realty Co. v. Hawkins (1937), 269 Ky. 563, 108 S. W. (2d) 507;

Ridgeway v. Cockburn (1937), 163 Misc. 511; 296 N. Y. S. 936;

Burke v. Kleiman (1934), 277 Ill. App. 519;

Doherty v. Rice (1942), 240 Wis. 389; 3 N. W. (2d) 734;

Porter v. Pryor (1942, Mo.), 164 S. W. 353;

Porter v. Johnson (1938), 232 Mo. App. 1150; 115 S. W. (2d) 529;

Mays v. Burgess (1945), 79 App. D. C. 343; 147 F. (2d) 869; 162 A. L. R. 168 (certiorari denied).

Decisions of the United States Court of Appeals for the District of Columbia approving the validity of restriction agreements are numerous, but as many of such cases have been before this Court on petitions for certiorari, it seems unnecessary to cite them here.

Other cases to the same effect might be cited, but, since we find no authority to the contrary, we think it must be taken as firmly established that covenants of this kind, being private contracts, do not, and cannot, deprive anyone of the equal protection of the law and are not subject to any constitutional objection.

B. Enforcement of the Restrictions by the Courts Does Not Deny Equal Protection of the Law nor Does It Violate the Due Process Clause.

If the covenants themselves are valid and do not contravene the Constitution, how can the decree of a court declaring such validity and requiring compliance violate any constitutional right? Is it conceivable that when

private individuals have entered into a perfectly legal, valid and binding contract, they cannot seek the aid of the courts in enforcing their rights under the contract, but are left to some form of self-help? If that be the law, what other contracting parties will find themselves in the same situation? Courts do not confer the right to contract. That is a common law, as well as a constitutional, right. Courts merely interpret and declare the rights of the parties to the contract, and provide a peaceful and orderly method for their enforcement. The right to contract, and the inviolability of contracts, was thought by the framers of the Constitution to be of such importance that they incorporated in Section 10, Article I, a prohibition against any state passing a law impairing the obligation of contracts.

Determination and enforcement of the rights of the parties to contracts is one of the most important aspects of a state court's jurisdiction, yet it is now seriously argued that while a court may have jurisdiction to hold a contract to be valid, it cannot enter a decree for its enforcement. Whatever may be our opinion as to the wisdom of contracts imposing restrictions as to the occupancy of real property, there can hardly be disagreement over the fact that a decision giving such a construction to the Constitution would result in a chaotic condition in the law of contracts. Under such a construction, would a note, or contract, or even a stipulation during the course of a legal proceeding, by which a party waived the right to a trial or to notice, deprive such party of due process or equal protection of the law? If the contract itself did not, would the recognition and enforcement of such contract by a court have that effect?

If this Court were to adopt such a construction of the Constitution, and every judgment of a Court held to be

action by the state, of the kind contemplated by the Fourteenth Amendment, into what new and unknown paths would this lead? If the owner of a tract of land makes an agreement with the Izak Walton Club, permitting its members, but no one else, to fish or hunt on his property, does he thereby deny the equal protection of the law to all non-members? If a non-member poaches on the property, and is arrested for trespass, and tried and fined by a Court, do the arresting officer and Court deny equal protection? If a private club limits its membership to members of a specified race, or to persons of a specified religious belief, or persons of one sex, and bars all others, does it deny all others the equal protection of the law? If such a club bars non-members from its club rooms or grounds, and police officers, or courts, by injunction, bar intruders, do these public officials or courts deny equal protection?

We doubt that petitioners would claim that equal protection was denied in such cases, yet what is the essential difference between such an agreement as we have suggested and an agreement between adjacent landowners that neither will allow his property to be put to a use objectionable to the other?

We respectfully submit that if petitioners' argument be upheld, and all the previous decisions overruled, the institution of private ownership and control of property will be seriously impaired. No one will know what use he may make of his property, or what contracts he may make concerning its use, or how he will enforce such contracts as he does make.

To what purpose is this Court urged to give such a strained and unnatural construction to the Constitution? Simply so that persons who have purchased property

knowing that it is restricted against their use may disregard the restriction and challenge the other parties to the contract to try to enforce it.

This argument has been made in many cases and in many courts; so far as we are able to ascertain it has been rejected in every court of last resort in which it has been urged. The reason for such rejection is obvious: The argument seeks to read into the Constitution something which is not there; to make the Constitution mean something which clearly it does not say, and never was intended to mean.

The underlying principle was tersely stated in *Application of Fleetwood Acres,* 62 N. Y. Supp. (2d) 669; affirmed 63 N. Y. Supp. (2d) 238; appeal denied 64 N. Y. Supp. (2d) 910, 271 App. Div. 754, as follows:

> "* * * the fourteenth amendment applies only to rights and not to remedies."

While that case did not involve race restriction, it did involve other restrictions on the use of real property, and the rule stated is equally applicable to race restrictions.

Appellants' contention was discussed and rejected by this court in *Corrigan v. Buckley,* (*supra*). Quoting from the Civil Rights Cases, 109 U. S. 3, 11, this Court said (p. 330):

> "It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject matter of the amendment."

Again (p. 331):

> "And, while it was further urged in this Court *that the decrees of the courts below in themselves deprived defendants of their liberty and property without due process of law,* in violation of the Fifth

and Fourteenth Amendments, this contention likewise cannot serve as a jurisdictional basis for the appeal. * * *; *and it likewise is lacking in substance.*" (Italics supplied.)

The *Corrigan* case is unquestionably authority for the proposition that neither the restriction agreements involved nor their enforcement by Court decrees violated the Fifth, Thirteenth or Fourteenth Amendment.

We have referred heretofore to the decision of the California District Court of Appeal in *Title Guarantee and Trust Company v. Garrott*, 42 Cal. App. 152. Because the decision in that case is so soundly grounded on reason and authority and because it had the full approval of the California Supreme Court in denying a hearing, we again quote from that opinion. After holding that the portion of the restriction prohibiting sale to a non-Caucasian violated Section 711 of the California Civil Code, relating to restraint on alienation, the Court said (p. 154):

"We do not base our conclusion upon any supposed constitutional right of respondent; we do not think that the condition in the deed violates any provision of the state or federal constitution. Upon this aspect of the case we agree with what is said by the Louisiana supreme court in Queensborough Land Co. v. Cazeaux, 136 La. 724 (Ann. Cas. 1916D, 1248, L. R. A. 1916B, 1201, 67 South. 641.) *The fourteenth amendment, in so far as it prohibits any abridgment of the privileges or immunities of citizens of the United States and guarantees the equal protection of the laws to all persons, addresses itself to the state government and its instrumentalities, to its legislative executive and judicial authorities, and not to contracts, between individuals. It is state action of a particular character that is prohibited. Individual invasion of*

individual rights is not the subject matter of the amendment. (Civil Rights Cases. 109 U. S. 18 (27 L. Ed. 835. 3 Sup. Ct. Rep. 18; see, also, Rose's U. S. Notes).) The fourteenth amendment, it is true, applies to the judicial as well as the legislative department of the state government. *But the judiciary does not violate this provision of the federal constitution merely because it sanctions discriminations that are the outgrowth of contracts made by individuals. A different question would be presented if the court, while sanctioning such a provision against persons of African descent as we find in the deed in question here, were subsequently to hold to be invalid a similar provision directed against Hindus, Cingalese and Maoris, or any other class of persons except negroes.* The equal protection clause of the fourteenth amendment makes but one demand upon the state, and gives to the state but one right. It is that the state shall make, execute, and interpret its laws without discrimination. It must not grant rights to one which, under similar circumstances, it denies to another." (Italics supplied.)

In *Los Angeles Investment Co. v. Gary*, 181 Cal. 680, 683, the California Supreme Court specifically approved the "scholarly opinion" of the District Court of Appeal in the *Title Guarantee* case.

The same argument was presented in *Burkhardt v. Lofton*, 63 Cal. App. (2d) 230, and the Court, in an opinion which the California Supreme Court approved, by refusal to grant a hearing, said (p. 238):

"The decree of the trial court in the instant case was not, within constitutional principles, action by the state through its judicial department. Plaintiffs' rights are derived from their contract, the subject

matter of which belonged exclusively to the contracting parties. The decree appealed from created no rights in plaintiffs; it only declared what they are and provided for their enforcement. If the contract is valid, it cannot be nullified under any theory that courts are without the power to enforce it."

Since this argument was made in the *Corrigan* case, and rejected by this Court, it is perhaps not surprising that in the many cases which have been decided since the decision in the *Corrigan* case, only a few of the opinions discuss this specific point. Doubtless that is because the soundness of this Court's opinion in the *Corrigan* case is so apparent. However, it must be remembered that whether discussed in the opinion or not, the point was inherently present in each of the decided cases, and must be taken as having been rejected. See also:

Janss Investment Co. v. Walden, 196 Cal. 753;

Stone v. Jones, 66 Cal. App. (2d) 264 (hearing by Supreme Court denied.)

It seems very strange, if there is substantial merit in the argument that a decree of a state Court enforcing a private contract constitutes action by the state itself, that every Court, so far as we can ascertain (excepting, possibly, an occasional trial court), to which that argument has been presented has rejected it.

C. Section 1978 of Revised Statutes Is Not Violated.

"The statutes, therefore, can afford no more protection than the Constitution itself. If, therefore, there is no infringement of defendants under the Constitution, there can be none under the statutes."

This language from the lower court in *Corrigan v. Buckley*, 299 Fed. 899, 902 states very aptly our position with respect to the statute.

The same arguments and cases that demonstrate the constitutionality of the restrictions uphold respondents' contention that Section 1948 of Revised Statutes is not violated. Private action by private citizens is not involved in that section of the Revised Statutes and certainly if the constitutional requirements of due process and equal protection are met, no one is deprived of any right.

II.

The Agreement Does Not Violate Public Policy.

"Limitations upon the use of real property such as the one under consideration have never been declared to be against public policy by legislative authority, so far as we are advised, and they have been uniformly upheld by the courts. Racial restrictions have been employed in the development of countless residential communities and have very generally been considered essential to the maintenance and stability of property values. Non-Caucasians are and always have been just as free to restrict the use and occupancy of their property to members of their own races as Caucasians have been. *The fact that the members of the Caucasian race have freely availed themselves of this right throughout the nation, even though those of the non-Caucasian races have not, is the most satisfactory proof of the public policy of the nation with respect to this phase of the right to contract. No doubt public policy changes and develops with the times, but these changes must have their sources in the citizenry and not in the decisions of courts or the pronouncements of publicists and politicians.* The right to con-

tract with reference to their own property is one that is preserved to all citizens and, except where restricted by law, is a right which the peoples of all races may exercise freely. It cannot be denied by the courts to those who make use of it in certain situations because others similarly situated may choose not to avail themselves of it. *The responsibility of striking down the validity of racial restrictions with respect to the use and occupancy of real property is one which no court or judge should assume on the strength of individual theories as to what constitutes the 'present' public policy on the subject or of personal belief that the consequences would be for the general good.* The desirability of a more understanding and harmonious relationship among the many races of our nation is something no one will deny, but it will come only with time and experience and it is a matter in which public thought and conscience cannot be directed or controlled by the courts through the uprooting of firmly established precedent." *Burkhardt v. Lofton* (*supra*), 63 Cal. App. (2d) 230, 239, 240. (Italics supplied.)

The foregoing opinion states the position of *amici curiae* on the question of public policy. We think the reasoning is irrefutable.

Mays, v. Burgess, 147 F. (2d) 869, 872, in which case this Court denied certiorari and a petition for rehearing, disposes of the public policy question in the following language:

"As stated before, rights created by covenants such as these have been so consistently enforced by us as to become a rule of property and within the accepted public policy of the District of Columbia. Little need now be said on the subject of that policy. The propo-

sition is not new and was unsuccessfully urged in the Corrigan case, *supra*, in this court and in the Supreme Court. And nothing is suggested now that was not considered then. The Constitution is the same now as then, and we are cited to no new public laws, nor indeed to any other course of practice of Government officials, which the private action of the original owners of the block in question contravenes. *And the public policy of a State of which courts take notice and to which they give effect must be deduced—in the main—from these sources. Surely it may not—properly—be found in our personal views on sociological problems.*" (Italics supplied.)

"Public policy," as related to race restrictions, was discussed by the Supreme Court of Michigan, *supra*, in *Parmalee v. Morris*, 218 Mich. 625, 188 N. W. 330, 38 A. L. R. 1180, 1182-3 (1922). That court said (p. 1184):

> "This brings up the question as to what interests of the state are likely to be injured if an owner of property, for reasons which are satisfactory to himself, refuses to sell himself, or permit his assignors to sell, to certain persons who may be distasteful to him as neighbors. Are there any interests of the state which will be promoted or advanced compelling the creation of such a condition in the community? The law is powerless to eradicate racial instincts or to abolish distinctions which some citizens do draw on account of racial differences in relation to their matter of purely private concern. For the law to attempt to abolish these distinctions in the private dealings between individuals would only serve to accentuate the difficulties which the situation presents.
>
> "'Suppose the situation was reversed, and some negro who had a tract of land platted it and stated in the recorded plat that no lot should be occupied by

a Caucasian, and that the deeds that were afterwards executed contained a like restriction; would anyone think that dire results to the white race would follow an enforcement of the restrictions? * * *

"The issue involved in the instant case is a simple one, *i.e.*, shall the law applicable to restrictions as to occupancy contained in deeds to real estate be enforced, or shall one be absolved from the provisions of the law simply because he is a negro? The question involved is purely a legal one. * * *"

There is no nationwide public policy against race restrictions. No act of Congress has declared such a policy. The closest approach to action by the Congress on the subject was its overwhelming defeat, in April, 1946, of a proposed resolution to prohibit such restrictions in the District of Columbia. The only definite evidence of a public policy that can be pointed out is found in the acts of the legislatures of the various states, the conduct of the citizens in imposing and enforcing such restrictions, and the unanimity of the courts in approving them.

No law of the State of Missouri prohibits these agreements; the Supreme Court of that state followed earlier cases in upholding their validity (*Koehler v. Rowland*, 275 Mo. 573). Certainly, the public policy of Missouri is clear, *i.e.*, this agreement does not contravene the public policy of that state. In fact, the *Koehler* case specifically held that the restriction there involved was not void on the ground of public policy.

Sir George Jessel, Master of the Rolls, said in *Besaut v. Wood*, L. R. 12 Ch. Div. 605, that public policy is "to a great extent a matter of individual opinion, because what one man or one judge might think against public policy, another might think altogether excellent public policy."

The same jurist in *Printing etc. Co., v. Sampson*, L. R. 19 Eq. 465, said:

> "If there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice."

Even if the contentions of petitioners as to "public policy" had substantial support, which they have not, there is a further and conclusive reason why the contract herein involved cannot be invalidated on the ground that it is contrary to public policy. That reason is set forth in *Stephens v. Southern Pacific Co.*, 109 Cal. 86, 95:

> "It is laid down as an elementary principle in Greenhood on Public Policy that, if a contract conform to the public policy of the state when made, a change in public policy will not avoid it."

In this case even petitioners must admit, the public policy of Missouri supported this agreement at the time it was made, and, therefore, even if this court should determine that there has been a change in public policy in that state, which we earnestly urge there has not been, such a change could not invalidate this contract.

As we have shown, there is no nationwide public policy on racial matters, other than that found in the Constitution and in laws passed by Congress under the Constitution, none of which purport to prohibit private agreements regulating the use of real property. As a result, a resident of Georgia, Alabama, or even Missouri, is surprised to find that in California, for example, the same schools are attended by white children and Negroes. The same public

facilities of every kind are used by all. Theatres do not have special seats for Negroes. These, so long as the Constitution is not violated by the states, are all matters which demonstrate that the states have varying public policy and, we submit that this is entirely proper. To declare that the states and the citizens thereof must adopt a uniform policy contrary to their wishes is improper under the Tenth Amendment to our Constitution, which provides:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

We submit that, under the present Constitution, to declare this agreement to be against public policy would be a serious and unjustifiable invasion of the rights reserved to the State of Missouri and to the people of that state, by the Constitution.

The subject of restrictions of the sort here under consideration is discussed in the American Law Institute's Restatement of the Law, under the title "Property," Section 406, Comment 1. and m., pages 2411, 2412, as follows:

> "The avoidance of unpleasant racial and social relations and the stabilization of the value of the land which results from the enforcement of the exclusion policy are regarded as outweighing the evils which normally result from a curtailment of the power of alienation.
>
> "The desirability of the exclusion of certain racial and social groups is a matter governed entirely by the circumstances of the state in which the land is located. The most important factor in solving this problem is the public opinion of the state where the land is located on the question of the racial or social

group involved living in close proximity to the racial or social groups not excluded from the land."

In connection with the discussion of public policy as applied covenants and deeds imposing restrictions on the use of real property, there has been much talk about "discrimination" by those who seek to prevent enforcement of such covenants, as though it were sinful to exercise discrimination in the choice of one's associates.

To "discriminate" means to distinguish—hence, to choose. Discrimination is as much a law of nature as the law of gravity. Man's whole existence revolves around the process of discrimination. We not only discriminate in the food we eat, but in the clothes we wear and everything that we do. All lodges, fraternities, clubs and organizations are based on discrimination. Banks discriminate in connection with loans; business houses discriminate in the extension of credit; insurance is based on discrimination. Marriage is directly the product of discrimination. Religions discriminate. The Catholic Church urges the members of its church to marry only Catholics. An Orthodox Jew is supposed to marry only a Jew, and the Jewish people have practiced discrimination so faithfully and with such determination down through the centuries that whole nations have flourished, disentegrated and disappeared while the Jewish people have kept their race intact. Certainly, there is nothing shameful about this attempt of a people or of a race to keep themselves segregated by discriminating in favor of people of their own race or religions. On the contrary, it is entirely praiseworthy, and has resulted in inestimable benefit to all mankind.

Discrimination underlies the philosophy of our form of government. We select our public officials by discrimination. When we vote, we discriminate, and we have a secret ballot to protect the process.

The right to discriminate is a precious privilege, one of those privileges which the people have declared by the Fourteenth Amendment shall not be abridged; it is synomous with freedom. Forced social equality is tyranny. We have equality of opportunity, which is consistent with our philosophy of government. But it is contrary to our philosophy for government to dictate to the individual how he shall live his own life; how and in what manner he shall seek his happiness, yet that is exactly what appellants are seeking to do.

III.

The Agreement Is in No Way Affected by Any Treaty of the United States.

In this case, petitioners seek to have this Court decide that certain provisions of the United Nations Charter compel a change in the law as to the validity of this agreement.

As respondents pointed out in their brief opposing issuance of certiorari, petitioners did not raise this question in their pleadings and the first time the question was raised was on the motion for rehearing filed by petitioners in the Supreme Court of Missouri. The question, therefore, is not properly before this Court. However, we shall discuss the contention as though it had been properly raised, without conceding that the contention is involved.

A. No Language in the Charter of the United Nations in Any Way Affects This Restriction Agreement.

An examination of the language used in the Charter discloses that it in no way changes either our established law or public policy covering this restriction agreement.

The sections of the Charter referred to are Articles 55c and 56, which pledge "universal respect for and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion." There is no lack of respect for or observance of human rights involved here, unless it is lack of respect for the rights of respondents. Petitioners seek to establish a new right in themselves and destroy an established right of respondents.

The Charter of the United Nations was intended to affect the relationships between the nations of the world; it never was intended to control the private business or social affairs of the citizens of the various nations. If that had been its purpose or effect, it never would have been proposed by the President nor ratified by the Senate, and it would have been beyond the power of the United States to make effective. Could the President and the Senate, by a treaty, abolish all political parties, or permit only one party, as some of the member nations do? For years there has been agitation in the Congress for a Constitutional Amendment establishing "equal rights" for women. Has that result been accomplished by the United Nations Charter?

If the Republic of Liberia is or should become a member of the United Nations, could it be contended that this section of the Charter would invalidate the section of the Liberian Constitution which denies to Caucasians the right to become citizens, or to own property? (Const. Liberia Art. V, Sec. 12-13.)

Assuming that the Charter was intended to affect the internal affairs of the citizens of the member nations, how does that affect this case? There is no "human right" nor "fundamental freedom" involved here, other than the

fundamental human right and freedom of every free man to control and protect his privately owned property and to choose his own associates and companions.

It seems to us to be too obvious to require further argument that the Charter of the United Nations never was intended to, and does not, affect a situation so obviously a matter of internal, private concern as the question now before the Court.

B. The Federal Government Cannot, Through Its Treaty Making Power, Encroach Upon Rights Reserved to the States or to the People.

For the sake of argument only, let us assume that it was the intention of the general language of the Charter of the United Nations to invalidate private agreements such as this. Even though that were true, which it obviously is not, the Charter would not invalidate this agreement because such invalidation would encroach upon the rights reserved to the states or to the people under the Tenth Amendment, and hence, beyond the power of the general government.

Article VI of the Constitution of the United States provides:

> "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, *under the authority of the United States,* shall be the supreme law of the land; and the judges in every State shall be bound thereby, any thing in the Constitution or laws of any State to the contrary notwithstanding." (Italics supplied.)

Article VI limits the treaty making power to those made "*under the authority of the United States.*" That

power extends only to matters which are proper and constitutional exercises of that power. The federal government cannot, under the guise of the treaty making power, encroach upon matters reserved to the states or to the peopl..

There are numerous pronouncements by this Court, and other Courts, setting forth the limitations on the treaty-making power. Mr. Justice Daniel, in the *License Cases*, 5 How. 613, 12 L. Ed. 256, speaking of Article VI of the Constitution said:

> "This provision of the constitution, it is to be feared, is sometimes applied or expounded without those qualifications which the character of the parties to that instrument, and its adaptation to the purposes for which it was created, necessarily imply. Every power delegated to the federal government, must be expounded in coincidence with a perfect right in the States to all that they have not delegated; in coincidence, too, with the possession of every power and right necessary for their existence and preservation: for it is impossible to believe that these ever were, in intention or in fact, ceded to the general government. Laws of the United States, in order to be binding, must be within the legitimate powers vested by the constitution. Treaties, to be valid, must be made within the scope of the same powers; for there can be no 'authority of the United States,' save what is derived mediately or immediately, and regularly and legitimately, from the constitution. A treaty, no more than an ordinary statute, can arbitrarily cede away any one right of a State or of any citizen of a State."

Justice Swayne in *United States v. Rhodes*, U. S. Cir. Ct. 1866, 1 Abb. U. S. Rep. 43, 44. Fed. Cases 16151, uses this language:

> "What is unwarranted or forbidden by the Constitution can no more be done in one way than in another. The authority of the national government is limited, though supreme in the sphere of its operation. As compared with the State governments, the subjects upon which it operates are few in number. Its objects are all national. It is one wholly of delegated powers. The States possess all which they have not surrendered; the government of the Union only such as the Constitution has given to it, expressly or incidentally, and by reasonable intendment. Whenever an act of that government is challenged a grant of power must be shown, or the act is void."

Justice Swayne, in the *Cherokee Tobacco* case, 11 Wallace 616, 20 L. Ed. 227, said:

> "It need hardly be said that a treaty cannot change the Constitution or be held valid if it be in violation of that instrument. This results from the nature and fundamental principles of our government."

Mr. Justice Clifford, in *Holden v. Joy*, 17 Wallace 243, 21 L. Ed. 523, in speaking of the treaty power said:

> "That the framers of the Constitution intended that it should extend to all those objects which in the intercourse of nations had usually been regarded as the proper subjects of negotiation and treaty, if not inconsistent with the nature of our government and the relation between the States and the United States."

We submit that certainly the invalidation of this agreement is not an object "which in the intercourse of nations had usually been regarded as the proper subjects of negotiation and treaty." The right to contract, guaranteed by our constitution, and the right to have the contract enforced previously discussed herein, cannot be abrogated by such a treaty. To do so would be a clear violation of rights not prohibited by any provision of the constitution, nor delegated to Congress, and therefore, under the Tenth Amendment reserved to the states and to the people.

Conclusion.

The many thousands of persons represented by the organizations for which this brief is filed are average American citizens; among them are Catholics, Jews and Protestants; there are members of labor unions, businessmen and professional men; they are as divided in their political allegiance as any other similar group of American citizens. The great majority of them are small home owners with average homes and average incomes. They are not engaged in persecuting the so-called minority groups. Their restriction agreements are not directed against Negroes, but against members of any race other than their own. This does not signify that they feel superior to the members of the other races, but simply that they prefer to associate with, and make their home among, members of their own race. To that end they have entered into contracts which, rightly or wrongly, they believe will add to their peace, happiness and satisfaction in their homes, and in the preservation of their property

values. They would defend just as vigorously the right of the people of any other race to contract in like manner. They have neither the funds nor the facilities, nor do they think it proper to attempt to match the vast amount of propaganda with which this country has been flooded during the past few months. They feel that their rights are grounded in the Constitution, and like good Americans they are content to rest their case with this great court.

If, now, or at some future time, an amendment to the Constitution or laws should be proposed to make such contracts illegal, that will present a different issue. The only issue now presented is whether the members of any community, whether Caucasian or non-Caucasian, can agree among themselves to limit the occupancy of their respective residences to members of their own race, and to have the right to have their contracts enforced by the state courts in the same manner that any other contract is enforced. It is a simple question of the right to contract and to enforce their contract rights in an orderly manner.

We submit that private contracts between private individuals relating to their private business and social affairs, or the enforcement of such contracts by the state courts, do not contravene any provision of the Constitution, laws or treaties of the United States; that the parties to such contracts are entitled to enforce their rights in their state courts; that there is no public policy of state or nation which would justify a Court refusing to enforce such restrictions; that each state is entitled to, and has, its own public policy on racial questions, which

policy is found in the acts of its Legislatures, its citizens and its courts. The public policy of the State of Missouri expressly recognizes the validity of such contracts.

We further respectfully urge that the past decisions of this Court and the decisions of the courts of the various states referred to in this brief have correctly interpreted the Constitution, and should be affirmed.

For these reasons, we urge that the decision of the Missouri Supreme Court be affirmed.

Respectfully submitted,

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